88-1891

Supreme Court, U.S.
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FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1988

M&M CONSTRUCTION CO. INC.
(and its successors),

Appellant,

vs.

GREAT AMERICAN INSURANCE CO.

Appellee.

JURISDICTIONAL STATEMENT
(State Civil Case)

On Appeal from the Court of Appeals of Texas,
Thirteenth District

/s/ Glynn A. Pugh
Glynn A. Pugh, Counsel
for Appellant
723 N. Upper Broadway, #512
Corpus Christi, Texas 78401
(512) 881-8483

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED ON APPEAL

Is due process of law denied a plaintiff, whose suit is arbitrarily dismissed for lack of a party, by state courts simply ignoring the pleadings adding a successor party? In a similar, recent case a state court judgment was set aside, where state court procedure served to deny due process in violation of the XIVth Amendment, *Peralta v. Heights Medical Center,* 56 LawWeek 4189-4191, *infra.*

LIST OF ALL PARTIES

The Appellant includes the following parties (1) *M&M Construction Co., Inc.* (M&M), petitioner in the trial court, and (2) its successors, namely, its two stockholders (a) *Estate of W. Paul Peacock, Deceased* and (b) *Estate of Patricia Peacock, Deceased.*

Respondent, defendant in the state courts, is one party: *Great American Insurance Co.*

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STATUTES:

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TEXAS LAW:

Texas Rules of Civil Procedure, Rule 166-A. 2

OPINIONS BELOW

The Appellant's application for writ of error to the supreme court of Texas (C-7670) was dismissed on November 23, 1988. App. p.1. Appellant's earlier appeal (a petition to the Texas supreme court) for a writ of mandamus (C-7569) was denied on June 29, 1988. App. p. 2.

Both of these appeals to the Texas Supreme Court were from a judgment of the 13th Court of Appeals of Texas issued on 03/24/88, and reported at 749 SW2d 526. App. pp. 3-5. It is from this judgment (13-87-097-cv) that appeal is here made.

The trial court's order of dismissal, is set out in the Appendix, pg. 11.

The Court's attention is directed to a companion case involving Appellant's lack of capacity as a party, rendered by the same appellate court on the same day (03/24/88), but having inconsistent results, as the lower court's dismissal was reversed. App. pp 6-10. The companion case is reported at 747 SW2d 552.

GROUNDS FOR JURISDICTION OF THIS COURT

Appellant asserts denial of due process by a state court system, in violation of the Due Process Clause of the XIVth Amendment.

The jurisdiction to review a decision of a 13th Court of Appeals of Texas decision denying due process is conferred on the U.S. Supreme Court by 28 USC Sec. 1257(2) and Article III, Sec. 2, U.S. Constitution. The final

action in the state court was the denial on November 23, 1988 of Appellant's application for writ of error. Appendix p.2.

That the Supreme Court has jurisdiction to review a state court judgment denying due process, as was done here, is settled by a recent decision of the Court: *Peralta v Heights Medical Center, Inc.* (No. 86-1430; Decided 02/24/88; 56 LW 4189-4191. See also *Demorest v City Bank Farmers Trust Co.* (1944) 321 US 36; *Thomas v Collins* (1945) 323 US 516.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The U.S. Constitution, Amendment XIV, Section 1 provides as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions of Texas law relating to summary judgments, contained in Rule 166-A, Texas Rules of Civil Procedure, are set out in the Appendix at pages 12-13.

STATEMENT OF THE CASE

1 – Progress of Case in State Courts

Appellant, an unpaid subcontractor, obtained first a judgment in the amount of $20,121.50 against the prime contractor, who was insolvent. Then Appellant brought this second suit in the 148th district court of Texas to recover from the Respondent, who was surety on the prime contractor's bond.

In the trial court Respondent moved for a summary judgment and a dismissal, based on plaintiff corporation's loss of its capacity to continue as a party. The dismissal motion was based M&M having been disenfranchised, for failure to pay its Texas franchise tax. Appellant filed pleadings (an amended petition) to add as successor party plaintiff its two stockholders. The trial judge, ignoring Appellant's timely filed amendment to the pleadings, dismissed the suit. App. pp. 11-12. As explained below, this dismissal served to deny Appellant access to the court system, and thereby served to deny due process of law to Appellant.

The Texas appellate court affirmed the dismissal, by making an incorrect finding that "M&M failed to file a timely response . . . [to] Great American's motion for summary judgment", namely, a date "not later than seven days prior to hearing". App. pg. 4. The appellate court, as did the trial court, ignored M&M's timely filed amended petition, App. pp. 13-25, filed on December 29, 1986, a date more than seven days prior to the hearing (held on January 07, 1987). As the amended petition added a successor party plaintiff, the courts erred in dismissing the case for lack of a party plaintiff. App. pp. 11-12. The

arbitrary dismissal by the trial court, ignoring the pleadings on file, was affirmed by the state court of appeals. App. pp. 3-6. The appellate court ignored the Appellant's briefs pointing out the trial court's abuse of discretion.

Appellant then applied to the state supreme court for a writ of mandamus, App. pg. 2, which was denied. Whereupon, Appellant applied to the state supreme court for writ of error, App. pg. 1, which also was denied. As a result of this second order of the Texas supreme court Appellant was finally denied a trial. Thereby Appellant was denied access to the state court system, and denied its property rights in violation of the Due Process Clause of the XIVth Amendment.

For the convenience of the Court a chronological schedule of proceedings before the trial court is present in summary form, as follows:

Date	Event
12/10/86	Defendent filed "motion for summary judgment"
12/29/86	Plaintiff filed first supplemental petition adding successor party
01/06/87	Plf. filed response to Def. "motion for summary judgment"
01/07/87	Plf. filed motion for court to appoint a trustee in liquidation
01/07/87	Hearing held by trial court
01/07/87	Court grants "Summary judgment" and dismisses case.

As indicated in this chronology, the amended petition, adding a qualified successor party, was timely filed. The

amended petition, filed on 12/29/86, was a response to the motion for summary judgment, filed 12/10/86. This response was filed more than seven days prior to the date of the hearing, held 01/07/87. The requirements of Rule 166-A were satisfied.

The trial court's ignoring of pleadings is an abuse of discretion, serving to deprive the Appellant of its right of access to the courts.

The Appellant's appeal duly noted the trial court's error, and properly asserted denial of due process of law. However, no mention of the amended petition filed in the trial court is to be found in the appellate court's opinion, App. pp. 3-5.

2 – STATE COURT ERRORS MADE

A – Trial court errors

The trial court, in ignoring the pleadings filed, abused its discretion. The amended petition, to add a qualified successor party, was certainly a response of Appellant to the plea in abatement. Under Texas law the proper corrective procedure for a disenfranchised plaintiff is filing additional pleadings to join a successor party plaintiff, *M&M Construction Co v Great American Insurance Co* (Tx.Ct.App.13,1988) 747 SW2d 552 (companion case). This prescribed procedure was followed by Appellant by the filing of amended petition. Only by ignoring the pleading filed and contained in the trial court record could the trial court dismiss the case, as if Appellant

remained in default without ever having added a qualified party plaintiff. The trial court judgment dismissing the cause of action was a denial of due process of law.

Further, the trial court erred in dismissing, because under Texas law the effect of a plea in abatement is merely to suspend the progress of a case, *M&M Construction Co., supra,* (companion case). The appropriate action for the trial court was simply to hold up any further action until a qualified party was joined, and not to dismiss the suit. The dismissal was contrary to state law.

The nature of the motion filed in the trial court by Respondent is clearly a plea in abatement, as it was based on Appellant's lack of capacity to continue as a party to the litigation. Applicable Texas law is explained in the companion case, App. pp. 6-10: a Texas corporation with its franchise revoked for failure to pay state franchise tax loses its capacity to proceed itself as a party in Texas courts, but a disenfranchised corporate plaintiff must be allowed to respond by adding a successor qualified party. In the instant situation, the property (right to sue) passes to the successors of the corporation, here the two stockholders. Appellant filed a pleading actually satisfying the ruling in the companion case, and did what was necessary to reactivate the suit. But this action was completely ignored by the trial court.

The trial court refused to recognize stockholder pleadings filed here to continue the cause of action. This was an abuse of discretion denying Appellant due process of law.

B – State court of appeals error

A comparison of the two appellate court decisions in the appendix [757 SW2d 552 and 749 SW2d 526] reveals inconsistent results on the same issue. The result in the instant case (the 148th district court), considering the opinion issued in the companion case (105th district court), is both absurd and ludicrous. The case law set forth in the companion case is that in event of a disenfranchised corporate plaintiff, successors of the corporation should be allowed to qualify as a party to reinstate and continue the law suit. In the companion case the trial court dismissal was reversed, and the case was remanded in order for the district court to permit the successor stockholders to qualify as a party to continue the law suit. App. pp. 6-10. There in the 105th district court (companion case) stockholders had not filed any pleading to qualify as a successor party.

In the instant case, however, the two successor stockholders actually filed pleadings to join, yet the trial court (148th district) dismissal was sustained by the court of appeals. But worse, the appellate court opinion contained no mention of the amended petition filed in the instant case. Consequently, the instant case result is inconsistent with the opinion in the companion case.

Appellant clearly asserted to the state court of appeals that a qualified successor party had been added by amending the petition in the instant case (148th district court), App. p.13. Nevertheless, the state court of appeals sustained the trial court's dismissal. These two opinions, ruling on the same issue, are inconsistent. The published opinions reveal no apparent inconsistency

because each opinion discusses a different issue of law. But the appellate court erred here in the instant case (appeal from 148th district court) because its opinion discusses law and rules on an issue which has no application whatsoever to the real issues actually before the court for decision, namely, the effect of pleadings and affidavits actually filed in the 148th district Court. Thereby, Appellant was denied access to the court system, and was deprived of its property without due process of law.

3 – State Supreme Court Ignored Errors Appealed

Appellant, concerned about denial of appeal to the state supreme court based on procedural grounds, filed two appeals to protect its rights. Appellant duly asserted before the Texas Supreme Court the denial of due process of law by the lower courts. Both appeals were denied, both the application for writ of mandamus to compel the trial court judge to recognize the pleading in the record and a petition for writ of error.

Dismissal of this case from the court system deprived Appellant its right to recover from the surety, thereby denying Appellant of its property. This arbitrary abuse of discretion of the state courts (ignoring of pleadings filed in the case) denied due process of law to Appellant. This type of action by Texas state courts (arbitrary dismissal by granting a motion for summary judgment) is not an isolated, solitary event. There exists a pattern of such abuse in the Texas court system. For another similar case see *Corpus Christi Taxpayers Association et al. v City of*

Corpus Christi et al. (Docket No. 88-1478, filed with U.S. Supreme Court on January 12, 1989).

Appellant duly asserted before the Texas Supreme Court that the lower courts had denied due process of law to Appellant. The state supreme court denied both appeals of Appellant.

SUBSTANTIALITY OF QUESTIONS PRESENTED

Three substantial issues are presented by this appeal. First, right of due process of law has been denied Appellant in violation of the Due Process Clause of the XIV Amendment. Appellant, plaintiff in a state court system, was denied access to the courts to enforce its legal remedy. The trial judge abused its discretion in ignoring pleadings filed, and in dismissing the suit. Such action, which is not due process of law, deprived Appellant its right to property, to wit, its right to recover from a surety a judgment against an insolvent principal.

Second, in the Texas court system there exists a pattern of granting summary judgments by trial judges in civil suits when dismissal is not justified. The instant case is not a solitary error. This arbitrary action of trial judges is common practice in the court system. Upon appeal the dismissals are usually affirmed. This arbitrary type of action by Texas courts to clear up their dockets is common. This practice serves to deny litigants, both plaintiffs and defendants, access to courts. In turn, numerous persons are thereby denied their rights under the Due Process Clause.

Third, a state appellate court has erred, rendering two judgments which are clearly inconsistent in result. As a result, sustaining the trial court's dismissal of this case resulted in denial of due process to Appellant. The inconsistent application of law here by the state court system denies access to the courts to litigants. This type of justice does not make use of or conform to due process of law. This violates the XIVth Amendment.

CONCLUSION

For the reasons indicated Appellant respectfully requests a review of the judgment of the state court which denied Appellant due process of law.

Respectfully submitted,

Glynn A. Pugh, Attorney for Appellant
723 N. Upper Broadway, Suite 512
Corpus Christi, Tx 78401
(512) 881-8483

No. _____

In The

Supreme Court of the United States

October Term, 1988

M&M CONSTRUCTION CO. INC.
(and its successors),

Appellant,

vs.

GREAT AMERICAN INSURANCE CO.

Appellee.

APPENDIX
of
JURISDICTIONAL STATEMENT
(State Civil Case)

APPENDIX

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SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

November 23, 1988

Mr. Glynn A. Pugh
723 N. Upper Broadway
Suite 512
Corpus Christi, TX 78401

Mr. Timothy P. Dowling
Gary, Thomasson, Hall & Marks
P.O. Box 2888
Corpus Christi, TX 78403

RE: Case No. C-7670

STYLE: M & M CONSTRUCTION COMPANY v. GREAT AMERICAN INSURANCE COMPANY

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the application for writ of error in the above referred case, as supplemented.

Respectfully yours,

Mary M. Wakefield, Clerk

By Blanca E. Morin
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

June 29, 1988

Mr. Glynn A. Pugh
723 N. Upper Broadway
Suite 512
Corpus Christi, TX 78401

Mr. Timothy P. Dowling
Gary, Thomasson, Hall & Marks
P.O. Box 2888
Corpus Christi, TX 78403

RE: Case No. C-7569

STYLE: DENNIS PEACOCK ET AL. v. THE HONORABLE MARGARITO C. GARZA ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By _____
Deputy

cc. Honorable Margarito Garza, Judge
148th Judicial District
Nueces County Courthouse
Corpus Christi, TX 78401

M & M CONSTRUCTION COMPANY, INC., Appellant,

v.

GREAT AMERICAN INSURANCE COMPANY, Appellee.

No. 13-87-097-CV

Court of Appeals of Texas, Corpus Christi.

March 24, 1988.

Rehearing Denied April 28, 1988.

Rehearing Dismissed May 19, 1988.

Appeal was taken from summary judgment entered by the 148th District Court, Nueces County, Margarito Garza, J. The Court of Appeals, Nye, C.J., held that nonmovant, who failed to expressly present to trial court any reasons for avoiding movant's right to summary judgment, could not raise objections to summary judgment for first time on appeal.

Affirmed.

1. **Judgment - 183**

If nonmovant wishes to have late response to summary judgment motion accepted and considered by trial court, it must first obtain leave of court to file late response.

2. **Judgment - 183**

Nonmovant's untimely response to motion for summary judgment was not properly before court at hearing

on motion for summary judgment, where response to motion for summary judgment was not filed until date before hearing, and there was no indication in record that nonmovant obtained or even attempted to obtain leave of court to file late response. Vernon's Ann. Texas Rules Civ.Proc., Rule 166A(c).

3. Appeal and Error - 223

Nonmovant, who failed to expressly present to trial court any reasons for avoiding movant's right to summary judgment, could not raise objections to summary judgment for first time on appeal. Vernon's Ann.Texas rules Civ.Proc., Rule 166A(c).

Glynn A. Pugh, Corpus Christi, for appellant.

Timothy P. Dowling, Gary, Thomasson, Hall and Marks, Corpus Christi, for appellee.

Before NYE, C.J., and KENNEDY and SEERDEN, JJ.

OPINION

NYE Chief Justice.

This is an appeal from a summary judgment rendered in favor of appellee, Great American Insurance Company (Great American). The trial court granted Great American's motion for summary judgment based upon the forfeiture of appellant's corporate charter.

In November 1985, appellant, M & M Construction Company, Incorporated, (M & M), filed suit against Great American. Thereafter, M & M failed to pay its franchise

taxes. As a result, its corporate charter was forfeited in July 1986.

In its motion for summary judgment, Great American alleged that M & M's suit was barred by Tex.Tax Code Ann. § 171.252 (Vernon 1982), which provides that a corporation whose privileges have been forfeited for non-payment of franchise taxes shall be denied the right to sue in the courts of this state. Great American attached to its motion a certified copy of the forfeiture of appellant's corporate charter from the Secretary of State's office.

[1] M & M neglected to file a timely response prior to the hearing set on Great American's motion for summary judgment as required by Tex.R.Civ.P. 166A(c). Rule 166A(c) requires an opposing party to file a response to a motion for summary judgment *not later than seven days* prior to the hearing set on the motion. If a non-movant wishes to have a late response accepted and considered by the trial court, it must first obtain leave of court to file a late response. Also there must be some affirmative indication in the record that the trial court permitted the late filing of the response. *Energo International Corp. v. Modern Industrial Heating, Inc.*, 722 S.W.2d 149, 151-52 (Tex.App.-Dallas 1986, no writ); *Yates v. Equitable General Insurance Co.*, 672 S.W.2d 822, 827 (Tex.App.-Houston [1st Dist.] 1984), *aff'd*, 684 S.W.2d 669 (Tex.1984); Tex.R.Civ.P. 166A(c).

[2] In the instant case, M & M filed its response to the motion for summary judgment the day before the hearing. There is no indication in the record that M & M obtained or even attempted to obtain leave of court to file its late response. Since the trial court did not expressly assent to the late filing, M & M's untimely response was not properly before the court at the hearing on the motion

for summary judgment. *Energo*, 722 S.W.2d at 151. Consequently, all that M & M can attack on appeal is the legal suffiency of the grounds expressly raised by Great American in its motion for summary judgment. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex.1979); *see also, Meyer v. Kupatt*, 549 S.W.2d 263, 265 (Tex.Civ.App.-Corpus Christi 1977, writ ref'd n.r.e.).

On appeal, M & M complains that the trial court erred in not recognizing its stockholders as qualified to continue the suit against Great American and that the trial court misapplied the Texas Tax Code. M & M also argues that a summary judgment is not the proper method by which to challenge its capacity to sue.

[3] We acknowledge the general rule that in order to contest a plaintiff's capacity to sue, an objection must be made by a plea in abatement at the trial court. *Bluebonnet Farms, Inc., v. Gibraltar Savings Association*, 618 S.W.2d 81, 83 (Tex.Civ.App.-Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Rimco Enterprises v. Texas Electric Service Co.*, 599 S.W.2d 362, 365 (Tex.Civ.App. – Fort Worth 1980, writ ref'd n.r.e.). However, M & M was charged with the duty of expressly presenting to the trial court any reasons for avoiding Great American's right to a summary judgment in writing at least seven days prior to the hearing. Having failed to do so, M & M's objections to the summary judgment cannot be raised for the first time on appeal. *City of Houston*, 589 S.W.2d at 677.

Appellant's points of error are overruled. Appellee's request for damages pursuant to Tex.R.App.P. 84 is denied. The judgment of the trial court is AFFIRMED.

M & M CONSTRUCTION COMPANY, INC., Appellant

v.

GREAT AMERICAN INSURANCE COMPANY and City of Corpus Christi, Appellee

No. 13-87-120-CV.

Court of Appeals of Texas, Corpus Christi

March 24, 1988.

Corporation brought action against insurer and city and motion was brought to dismiss. The 105th District Court, Nueces County, Manuel Banales, J., granted dismissal and appeal was taken. The Court of Appeals, Nye, C.J., held that: (1) trial court should have allowed corporation reasonable opportunity to amend its pleadings to cure its lack of capacity to sue by either paying its delinquent franchise taxes or by bringing suit in shareholders' names before dismissing cause with prejudice, and (2) absence of statement of facts was not fatal to appeal.

Reversed and remanded.

1. **Pretrial Procedure - 557**

Challenge to plaintiff's legal capacity to sue is properly raised by verified plea in abatement and not by motion to dismiss.

2. **Pleading - 106(1)**

Inasmuch as substance of defendant's motion challenged plaintiff's capacity to sue, motion was in essence a

plea in abatement, and Court of Appeals would attach no controlling effect to styling of defendant's pleading and instead would treat joint motion to dismiss as plea in abatement.

3. Motions - 15

Name by which motion is designated does not determine its nature; rather, it is substance of motion and effect which it will have that determines its character.

4. Pleading - 106(2)

Plea in abatement is dilatory plea which does not defeat pending action but merely postpones enforcement of right alleged in petition and such plea should not only show grounds upon which suit was improperly brought but must also set forth information necessary to guide plaintiff to correct procedure if defect is one which can be cured.

5. Abatement and Revival - 71

Even if case is dismissed upon plea in abatement after plaintiff has been given reasonable opportunity to amend, it is revived upon removal of obstacle which prevented its further prosecution in first instance.

6. Corporations - 617(2)

Purpose of statute prohibiting corporation whose charter has been forfeited for nonpayment of franchise

taxes from suing in state courts is to encourage corporations to pay their taxes and not to prohibit corporate cause of action. V.T.C.A., Tax Code § 171.252.

7. Corporations - 615-1/2

Corporation whose charter has been forfeited may obtain reinstatement of its charter and corporate privileges by paying its deliquent taxes together with any penalties and interest thereon, and once corporation pays its taxes, reinstatement of its charter will relate back and revive whatever rights corporation had at time suit was filed. V.T.C.A., Tax Code §§ 171.312-171.315, 171.252.

8. Corporations - 617(2)

While corporation's charter is forfeited, it retains legal title to its assets, but beneficial title to corporation's assets passes to stockholders, so that stockholders may prosecute or defend such actions in courts as may be necessary to protect their property rights. V.T.C.A., Tax Code § 171.252.

9. Pleading - 111.48

Pretrial Procedure

Upon sustaining plea in abatement challenging corporation's legal status to sue because of corporation's forfeiture of privileges of suing in state for nonpayment of franchise tax, trial court should have allowed corporation reasonable opportunity to amend its pleadings to cure its lack of capacity by either paying its delinquent

franchise taxes or by bringing suit in shareholders' names before dismissing cause with prejudice, as by dismissing suit with prejudice, trial court effectively forever barred corporation from having its suit heard on merits, and it was only in event that corporation refused or was unable to cure its lack of capacity to sue that dismissal would be appropriate. V.T.C.A., Tax Code § 171.252.

10. Appeal and Error - 554(1)

Although affadavit of corporation's stockholder attesting to events at hearing on plea in abatement was not substitute for statement of facts, corporation's challenge to trial court's sustaining of plea in abatement and dismissing action involved erroneous pleadings and rulings thereon, so that absence of statement of facts was not fatal to its appeal.

Glynn A. Pugh, Corpus Christi, for appellant.

Carol Estes Bray, Timothy P. Dowling, Corpus Christi, for appellee.

Before NYE, C.J., and KENNEDY and SEERDEN, JJ.

OPINION

NYE, Chief Justice.

This is an appeal from an order dismissing appellant's suit with prejudice.

In February 1986, appellant, M & M Construction Company, Inc. (M & M), filed suit against appellees, Great American Insurance Company (Great American) and the City of Corpus Christi (City). Thereafter, M & M

failed to pay its Texas franchise tax. As a result, its corporate charter was forfeited by the Secretary of State in July 1986. Great American and City responded by filing a joint motion to dismiss alleging that M & M's suit was barred by Tex.Tax Code Ann. § 171.252 (Vernon 1982). This statute prohibits a corporation whose privileges have been forfeited for nonpayment of franchise taxes from suing in the courts of this State. Appellees attached a certified copy of the forfeiture of M & M's charter to their motion.

[1,2] A challenge to a plaintiff's legal capacity to sue is properly raised by a verified plea in abatement and not by a motion to dismiss. *Bluebonnet Farms, Inc., v. Gibraltar Savings Association,* 618 S.W.2d 81, 83 (Tex.Civ.App.-Houston [1st Dist.] 1981, writ ref'd n.r.e.); Tex.R.Civ.P. 93(1). Since the substance of appellee's motion challenged appellant's capacity to sue, the motion is in essence a plea in abatement. We attach no controlling effect to the styling of appellee's pleading, and we treat appellee's joint motion to dismiss as a plea in abatement.

[3] The name by which a motion is designated does not determine its nature. Rather, it is the substance of the motion and the effect which it will have that determines its character. *Texas Highway Department v. Jarrell,* 418 S.W.2d 486, 488 (Tex.1967); *Bryce v. Corpus Christi Area Convention & Tourist Bureau,* 569 S.W.2d 496, 498 (Tex.Civ.App.-Corpus Christi 1978, writ ref'd n.r.e.); Tex.R.Civ.P. 71.

[4] A plea in abatement is a dilatory plea which does not defeat the pending action but merely postpones the enforcement of a right alleged in the petition. Such a

plea should not only show the grounds upon which the suit was improperly brought but must also set forth the information necessary to guide the plaintiff to a correct procedure if the defect is one which can be cured. *Atkinson v. Reid*, 625 S.W.2d 64, 67 (Tex.App.-San Antonio 1981, no writ); *Bluebonnet Farms, Inc.*, 618 S.W.2d at 83; *Bryce*, 569 S.W.2d at 499.

[5] This court had occasion to consider the effect of sustaining a plea in abatement in *Bryce v. Corpus Christi Area Convention & Tourist Bureau*, 569 S.W.2d 496 (Tex.Civ.App.-Corpus Christi 1978, writ ref'd n.r.e.). There, we noted that when a plea in abatement is sustained, the suit should not be dismissed until the plaintiff has been given a reasonable opportunity to amend, if it is possible to do so, and thereby remove the obstacle which defeated the suit initially filed. Even if the case is dismissed, it is revived upon the removal of the obstacle which prevented its further prosecution in the first instance. *See also Texas Highway Department*, 418 S.W.2d at 488; *Atkinson*, 625 S.W.2d at 66.

We now look to see whether appellant, if it had been given a reasonable opportunity to amend, would have been able to remove the obstacle which defeated the suit initially filed.

[6] Appellees correctly cite Tex.Tax Code Ann. § 171.252 as prohibiting a corporation whose charter has been forfeited for nonpayment of franchise taxes from suing in the courts of this State. The purpose of this statute, however, is to encourage corporations to pay their taxes and not to prohibit a corporate cause of action. *Bluebonnet Farms, Inc.*, 618 S.W.2d at 85; *see also Rushing v.*

International Aviation Underwriters, 604 S.W.2d 239, 242 (Tex.Civ.App.-Dallas 1980, writ ref'd n.r.e.).

[7] A corporation whose charter has been forfeited may obtain reinstatement of its charter and corporate privileges by paying its delinquent taxes together with any penalties and interest thereon. Tex.Tax Code Ann. §§ 171.312-315 (Vernon 1982). Once a corporation pays its taxes, the reinstatement of its charter will relate back and revive whatever rights the corporation had at the time the suit was filed. *Bluebonnet Farms, Inc.*, 618 S.W.2d at 85.

[8] While the corporation's charter is forfeited, it retains the legal title to its assets, but the beneficial title to the corporation's assets passes to the stockholders. The stockholders may then prosecute or defend such actions in the courts as may be necessary to protect their property rights. *Dunagan v. Bushey*, 152 Tex. 630, 263 S.W.2d 148, 152 (1953); *Humble Oil & Refining Co. v. Blankenburg*, 149 Tex. 498, 235 S.W.2d 891, 894 (1951); *Bluebonnet Farms, Inc.*, 618 S.W.2d at 84; *Regal Construction Co. v. Hansel*, 596 S.W.2d 150, 153 (Tex.Civ.App.-Houston [1st Dist.] 1979, writ ref'd n.r.e.).

[9] In the instant case, appellant complains by two points of error that the trial court should have allowed the litigation to continue by substituting the corporation's stockholders as the plaintiffs. The substitution of the corporation's stockholders as plaintiffs is a possible remedy to appellant's lack of capacity to sue. Consequently, the trial court should have allowed appellant a reasonable opportunity to amend its pleadings to cure its lack of capacity by either paying its delinquent franchise taxes or

by bringing suit in the shareholders' names before dismissing the cause with prejudice. By dismissing appellant's suit with prejudice, the trial court effectively forever barred appellant from having its suit heard on the merits. The use of a "plea in abatement" to dispose finally of litigation is not to be encouraged. *Hatfield v. City of Port Arthur*, 598 S.W.2d 669, 671 (Tex.Civ.App.-Beaumont 1980, no writ). In the event that appellant refused or is unable to cure its lack of capacity to sue, a dismissal would then be appropriate.

[10] Next, we address appellee's complaints that appellant has failed to preserve anything for appellate review since the statement of facts of the hearing on appellees' plea in abatement is not included in the appellate record. The record does include the transcript. Instead of a proper statement of facts, however, appellant has attached to its appellate brief an affidavit from one of appellant's stockholders. The affiant attested to the events occurring at the hearing. Such an affidavit is not a substitute for the statement of facts. The question and answer form of the statement of facts as reproduced from the words spoken by court, counsel, and witnesses unblemished by human interpretations constitutes a proper statement of facts. *Wright v. Wright*, 699 S.W.2d 620, 622 (Tex.App.-San Antonio 1985, no writ). Such a statement of facts is required when the complaint on appeal is that the evidence is insufficient or conclusive. *Tidelands Life Insurance Co. v. Harris*, 675 S.W.2d 224, 226 (Tex.App.-Corpus Christi 1984, writ ref'd n.r.e.). Without a statement of facts, appellate courts are limited generally

to complaints involving errors of law, erroneous pleadings or rulings thereon, an erroneous charge, irreconcilable conflicts of jury findings, summary judgments and fundamental error. *American Mutual Liability Insurance Co. v. Guerrero,* 678 S.W.2d 264, 265 (Tex.App.-Corpus Christi 1984, no writ).

Since appellant's complaints involve erroneous pleadings and rulings thereon, the absence of the statement of facts is not fatal to its appeal.

The judgment of the trial court is REVERSED and the cause is REMANDED.

NO. 85-6321-E

M & M CONSTRUCTION CO.	*	IN THE DISTRICT COURT OF NUECES COUNTY, TEXAS
VS.	*	
GREAT AMERICAN INSURANCE COMPANY	*	148TH JUDICIAL DISTRICT

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Came on properly for consideration of the ___ day of January, 1987 the Motion for Summary Judgment filed by defendant, Great American Insurance Company (called "Great American" herein). Upon consideration of the Motion for Summary Judgment filed by Great American, the other pleadings on file, the argument of counsel, the summary judgment evidence introduced by Great American that is in this case, and all other relevant matters, the Court finds that the relief requested in the motion should be granted. Pursuant to § 171.252 of the Texas Tax Code, plaintiff cannot pursue this case since the corporate charter of plaintiff has been forfeited due to plaintiff's failure to pay its franchise taxes as required by laws of the State of Texas. It is hereby ORDERED, ADJUDGED and DECREED that summary judgment is granted in favor of defendant, that plaintiff shall take nothing by this suit, and that all costs of courts are hereby awarded against plaintiff, for which let execution issue if not paid.

SIGNED this 7th day of January, 1987.

HONORABLE MARGARITO GARZA

NO. 85-6321-E

M & M CONSTRUCTION CO.	*	IN THE DISTRICT COURT NUECES COUNTY, TEXAS
Plaintiff	*	
VS.	*	148TH JUDICIAL DISTRICT
GREAT AMERICAN INSURANCE CO.,	*	
Defendant	*	

PLAINTIFF'S FIRST SUPPLEMENTAL PETITION

COMES NOW, the Plaintiff, *M&M Construction Co., Inc.*, complaining of *Great American Insurance Company* (Defendant herein.) Defendant is an insurance company who wrote a Performance Bond and Payment Bond on a contract between the City of Corpus Christi and a contractor insured by Defendant. The contractor defaulted, and Defendant has failed to pay amount claimed by Plaintiff as due and owing. Plaintiff (a subcontractor) obtained a judgment against the contractor (*M&M Construction Co. v. Ibanez Construction Company*, Cause # 85-4151-B, 117th Dist., Ct., signed 09/19/1986). Notice of the earlier suit was given to Defendant, who elected not to join in that related suit against its Principal. Plaintiff here seeks to recover from Defendant based on (1) the Payment Bond and (2) unjust enrichment or "quantum meruit". Plaintiff further alleges as follows:

I Parties

Plaintiff is a corporation which was organized under the law of the State of Texas. Its president is Dennis L. Peacock, who is also its registered agent. Its principal

place of business is at 6103 Leopard St., Corpus Christi, Texas. Attached as Exhibit A to this Supplemental Petition are three documents showing the right of the individual, Dennis L. Peacock to represent Plaintiff in this cause of action.

The Defendant is an insurance company from the State of Ohio, and it is authorized to do business in the State of Texas. The resident agent for Defendant, who serves for the purpose of notice and service of process, is as follows:

L.R. Campbell & Associates, Inc.
P.O. Box 6789, 3765 S. Alameda
Corpus Christi, Texas 78411

Service in this cause may be made on the Defendant by delivery to its resident agent.

II Venue and Jurisdiction

Venue for this suit lies in Nueces County, Texas. This court has jurisdiction over these causes of action.

III FIRST CAUSE OF ACTION

1– the City of Corpus Christi in August, 1984 awarded a construction contract to Ibanez Construction Company, Inc. hereinafter referred to as "Contractor". This contract called for the construction of improvements to the Corpus Christi Golf Center, namely, building golf-cart paths.

2– In connection with this construction contract Defendant for the payment of insurance premiums provided two coverages for the City: one was for performance of

the contract and the other was for payment of suppliers and subcontractors. These two coverages were provided by two separate bonds. Attached to the Original Petition as Exhibit A is a copy of the Performance Bond and attached to the Original Petition as Exhibit B is a copy of the payment Bond.

2– The contractor abandoned performance of the golf-course-path contract. Under a separate agreement between City and Plaintiff, the work prescribed in the abandoned contract was completed in early June, 1985. To avoid duplication of statement of facts, reference is made to the facts alleged in Part IV of this Supplemental Petition.

3– Plaintiff was a supplier of services and subcontractor to the Contractor. Copies of invoices for work performed by Plaintiff were delivered to the City and the Contractor. The invoices were payable not later than upon completion of the job. As the invoices remained unpaid, Plaintiff sued and obtained judgment against the contractor, and Defendant was provided a copy of the petition in that suit when it was filed. Defendant was asked by Plaintiff to join as a party to that earlier suit, but Defendant did not do so until after judgment was rendered, when it was too late. A copy of that final judgment was attached to the Original Petition, marked Exhibit C of Petitioner, and by this reference is deemed incorporated herein.

4– That judgment remains unpaid despite Plaintiff's efforts to collect it. Consequently, Plaintiff has made demand on Defendant for payment of that judgment, as Defendant underwrote the Payment Bond. Although obligated under the Payment Bond, Defendant has not paid any part of the judgment obtained against the Contractor.

5– In view of these allegations, Plaintiff is entitled to recover from Defendant under the terms of the Payment Bond, based on the judgment against the Contractor.

IV SECOND CAUSE OF ACTION
based on
UNJUST ENRICHMENT

The Plaintiff is entitled to recovery from Defendant, based on unjust enrichment, or quantum meruit. In support thereof Plaintiff alleges the follwoings facts:

1– Defendant guaranteed with a Performance Bond and a Payment Bond the golf-course-path contract of the City of Corpus Christi. This job was to begin on September 07, 1984 and was to be completed in 20 working days. The contract with a price of $37,285.82 was awarded to Ibanez Construction Company, Inc.

2– The defendant knew or should have known of the default by the contractor, Ibanez, at least by January, 1985. By that time Ibanez had received interim payments of $21,448.35 which were retained by Ibanez and not paid to the two principal subcontractors. Juan Dominguez (material supplier) and Plaintiff. Ibanez Construction also defaulted on a total of six City construction contracts, more or less, bonded by the Defendant. These defaults were known or should have been known by Defendant before March, 1985. Apparently Defendant bonded Ibanez, relying on false financial statements submitted by Ibanez earlier before August, 1984. Defendant was ordered by the City in March, 1985 to assume the place of the defaulting contractor, and Defendant did not respond

within the two weeks. Defendant was obligated to complete the golf-course-path construction.

3– Plaintiff rendered services beneficial to Defendant by completing the golf-course-path contract, which was in default. The City in May, 1985 proceeded to complete the golf-course-path construction, by agreeing with M&M construction Company to do the work for the amount of $15,250. Plaintiff completed the job, and in the first week of June, 1985 final payment was made to Plaintiff of the $15,250.

4– These services were valuable for Defendant, relieving the insurance company from paying the City of Corpus Christi under the Performance Bond underwritten by it.

6– Defendant received the benefit of Plaintiff's separate contract with the City for completion of the golf paths.

7– It is reasonable and proper, as Plaintiff expected, that it be paid for all its services rendered in connection with the golf-course-path improvements.

8– Defendant would be unjustly enriched if permitted to retain the benefits of Plaintiff's services without payment therefor. Such benefit was at least $20,121.50, the amount of Plaintiff's judgment against Ibanez Construction Co.

V MEASURE OF RECOVERY

Under the cause of action based on the Payment Bond, Plaintiff is entitled to recovery from the Surety/Defendant in the amount of Plaintiff's judgment against the Principal (Contractor), subject to any valid off-set proven by Defendant.

Under the cause of action based on "quantum meruit", Defendant obtained funds due the City under the Performance Bond. Defendant was unjustly enriched if permitted to retain the benefits of Plaintiff's performance, including both before and after default by the contractor. Plaintiff is entitled to recover of the fair value of the materials and services provided, while the Defendant knowingly stood by accepting the benefits.

Because of Defendant's refusal to pay Plaintiff amounts owed, Plaintiff's working capital was so reduced that it was forced out of business. Plaintiff seeks an award of fair damages for losses sustained as a natural consequences of Defendant's refusal to pay its obligation timely.

WHEREFORE, ALLEGATIONS CONSIDERED, Plaintiff prays:

(1) that Defendant be duly cited to answer this First Supplemental petition, (2) after trial and verdict, judgment be awarded Plaintiff based on the two causes of action, either one or both, as provided by law, (3) interest from the date of invoice to judgment, and after judgment until paid, (4) a reasonable amount of attorneys fees for necessary services of Plaintiff's counsel in this cause, and (5) for such other and further relief, special and general, in law and equity, to which Plaintiff may be entitled.

Glynn A. Pugh, Attorney for Plaintiff
Tx. Bar 16384000
723 N. Upper Broadway
(512) 881-8483
Corpus Christi, Tx. 78401

NO. 85-6321-E

M & M CONSTRUCTION CO.	*	IN THE DISTRICT
	*	COURT NUECES
Plaintiff	*	COUNTY, TEXAS
	*	
VS.	*	148TH JUDICIAL
	*	DISTRICT
GREAT AMERICAN INSURANCE CO.,	*	
	*	
Defendant	*	

EXHIBIT A
attached to
PLAINTIFF'S FIRST SUPPLEMENTAL PETITION

This exhibit supplies three documents to confirm the authority of the individual, Dennis L. Peacock, to proceed with representing the Plaintiff in this course of action.

Supplement #1 serves as an affidavit showing the current stockholders of the Plaintiff, a Texas corporation which has failed to pay its franchise tax.

Supplement #2 is the appointment of Dennis L. Peacock as principal to act for the stockholders of Plaintiff.

Supplement ## is the acceptance by Dennis L. Peacock of this appointment as principal.

NO. 85-6321-E

M & M Construction Co.	* IN THE DISTRICT
Plaintiff	* COURT OF NUECES
	* COUNTY, TEXAS 148TH
v.	* JUDICIAL DISTRICT
	*
Great American Ins. Co	*
Defendant	*

DECLARATION OF CORPORATE COUNSEL

This declaration is made by me, David L. Smith, in connection with the above-identified cause.

1. My name is David L. Smith. I am an attorney practicing law in Corpus Christi, Texas.

2. One of my clients is the M&M Construction Co, Inc., a corporation incorporated in the State of Texas. I have served as corporate counsel for this corporation since the year 1974.

3. I am advised that this corporation is delinquent in paying its Texas franchise tax.

4. The President of this corporation is Dennis L. Peacock, duly elected by the board of directors. Mr. Peacock has served as President since October 12, 1982.

Supplemental #1

5. The stockholders of this corporation, according to the record book, are as follows:

Name	*No. of Shares Owned*
Estate of W. Paul Peacock, Deceased	5,273
Estate of Patricia Peacock, Deceased	5,273

6. Dennis L. Peacock continues to serve as the chief executive officer of this business.

David L. Smith

[Acknowledgment before notary public]

NO. 85-6321-E

M & M CONSTRUCTION CO. Plaintiff VS. GREAT AMERICAN INSURANCE CO., Defendant	* IN THE DISTRICT * COURT OF NUECES * COUNTY, TEXAS * * 148TH JUDICIAL * DISTRICT * * *

AUTHORIZATION OF AGENT

This authorization is made by undersigned persons, in connection with the above-identified causes of action.

1. The Plaintiff in this cause of action, M&M Construction Co., Inc. has had as its President, Dennis L. Peacock.

2. We are advised that the Texas franchise tax of the corporation is unpaid.

3. We hereby authorize as our agent, Dennis L. Peacock, to represent our interest in this corporation.

4. Our agent is specifically vested with full authority in connection with this litigation, including the incurring of costs and the distribution of any recovery to us or creditors, as provided by law.

Supplemental #2

The Estate of M. Paul Peacock Deceased	The Estate of Patricia Peacock Deceased
By:_____	By: _____
_____	Dennis L. Peacock Independent Executor

Printed name: Martin Garza

My commission Expires: June 1988

This instrument was acknowledged before me on this day 25 day of December, 1986 before Martin Garza by Susanne Spooner Noll.

Signature:

Printed name:

My commission expires: June 1988

NO. 85-6321-E

M & M Construction Co.	* IN THE DISTRICT
Plaintiff	* COURT OF NUECES
	* COUNTY, TEXAS 148TH
v.	* JUDICIAL DISTRICT
	*
Great American Ins. Co	*
Defendant	*

This acceptance of appointment is made by the undersigned, Dennis L. Peacock, in connection with the above-identified cause.

1. My name is Dennis L. Peacock, and I am serving as the last elected president of the Plaintiff, M&M Construction Co., Inc.

2. I have read the related "Authorization of Agent", signed by the stockholders of M&M Construction Co., which appoints me to represent the stockholders in connection with the affairs of the corporation, and in particular to represent them and the corporation in connection with this cause of action.

3. I accept without reservation the power and authority vested in me by that document.

4. I agree to serve on behalf of those stockholders, representing them in this cause of action.

Supplement #3

(Signature of Dennis L. Peacock)

Dennis L. Peacock

ACKNOWLEDGMENT before notary public

RULE 166a. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before

judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be

made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers of parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained of depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith., Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

GLYNN A. PUGH

ATTORNEY
723 N. UPPER BROADWAY, SUITE 512
OIL INDUSTRIES BUILDING
CORPUS CHRISTI, TEXAS 78401
512-881-8483

February 14, 1989

Ms. Beth A. Gray, Clerk
13th Court of Appeals
10th Floor
Nueces County Courthouse
901 Leopard
Corpus Christi, Texas 78401

Re: Notice of Appeal
Cause No 13-87-00097-CV

Dear Ms. Gray:

Previously I gave "notice of appeal" of the cause, as identified above and in the attached notice, to the parties, to the trial court and to the Clerk of the Supreme Court of Texas.

By telephone Ms. Mary Wakefield advised me that perhaps notice of appeal should also be given to your court. I am now following that good advice.

I am filing first with the U.S. Supreme Court a Statement of Jurisdiction. The record of this cause before your court need not be submitted at this time. I also understand that the trial court record has been remanded to the trial court.

Yours truly,
/s/ Glynn A. Pugh

Enclosure: Notice of Appeal

Cause No. 13-87-00097-CV

****

TO THE
COURT OF APPEALS FOR TEXAS,
THIRTEENTH DISTRICT

****

M&M CONSTRUCTION CO., INC.
(AND ITS SUCCESSOR PARTY),

Appellant

-against-

GREAT AMERICAN INSURANCE COMPANY,

Appellee

****

Notice of Appeal

TO THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

****

/s/ Glynn A. Pugh
Glynn A. Pugh, Attorney
for Appellant
723 N. Upper Broadway, 512
Corpus Christi, Texas 78401
(512) 881-8483

NOTICE OF APPEAL

M&M Construction Co, Inc., includings its successors, hereby give notice of appeal to the U.S. Supreme Court, as prescribed in Rule 10 of the Rules of the U.S. Supreme Court.

Appeal is made from the judgment in *M&M Construction Co., Inc. (and its successor party) v Great American Insurance Co.*, Case No. C-7670 before the Supreme Court of Texas. In this cause the judgment appealed from is the dismissal of the application for writ of error of M&M Construction Co. The date of entry of this judgment was: November 23, 1988.

The same cause was also before the Texas Supreme Court in another docket number, *M&M Construction Co., Inc (and its successor party) v Great American Insurance Co.*, Case No. C-7569. In case C-7569 M&M construction Co.'s application for writ of mandamus was denied on June 29, 1988. Both these Texas Supreme Court cases were appeals from a single Texas Court of Appeals decision: *M&M Construction Co, Inc. v Great American Insurance Co.*, No. 13-87-097-CV, (Rehearing denied April 28, 1988 and Rehearing dismissed May 19, 1988), 749 SW2d 526. Each appeal involved a different kind of remedy, requiring a different procedure to be followed in the appeal, but both complained on the denial of due process of law by the trial court.

The Supreme Court has jurisdiction to review final judgments rendered by the highest court of a State, 28 USC Section 1257. There has been a denial of due process

of law to the Appellant. There exists. There exists jurisdiction in the U.S. Supreme Court over this writ of certiorari.

/s/ Glynn A. Pugh
Glynn A. Pugh, Attorney for M&M Construction Co., Inc.
P.O. Box 4932
Corpus Christi, Tx 78469
(512-881-8483)

Certificate of Service

I certify that a copy of this notice has been mailed to each of opposing parties, and to the lower courts, as provided in the applicable Rules of Procedure on this 2nd day of February, 1989, using the following addresses:

District Clerk, Oscar Soliz,
148th District Court
P.O. Box 2987
Corpus Christi, TX 78403

Corporate Secretary
Great American Ins. Co.
P.O. Box 2575
Cincinnati, Ohio 45201

Mary Wakefield, Clerk
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Attorney Timothy Dowling
Gary, Thomasson et al.
P.O. Box 2888
Corpus Christi, Texas 78403

/s/ Glynn A. Pugh
Glynn A. Pugh

[mm.noticel]

Supreme Court, U.S.
FILED
JUN 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1891

In The

Supreme Court of the United States

October Term, 1988

M&M CONSTRUCTION CO., INC.

Appellant,

vs.

GREAT AMERICAN INSURANCE CO.

Appellee.

MOTION TO DISMISS

TIMOTHY P. DOWLING
Counsel for Appellee
GARY, THOMASSON, HALL & MARKS
210 S. Carancahua
Corpus Christi, Texas 78401
(512) 884-1961

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES BEFORE THE COURT

The only parties of record in the state proceedings were M & M Construction Co., Inc. ("M & M"), the plaintiff in the trial court, and Great American Insurance Co. ("Great American"),[1] defendant. Appellant's inclusion of M & M's purported "successors, namely, its two stockholders," in its identification of parties to this appeal is improper and misleading since the alleged individual successors never appeared as parties in the actions below.

---

1. Appellee is a subsidiary of Great American Holding Corporation, which is a subsidiary of American Financial Corporation. Other subsidiaries include ABI Management, Inc., Agricultural Excess and Surplus Insurance Company, Agricultural Insurance Company, American Alliance Insurance Company, American Empire Surplus Lines Insurance Company, American National Fire Insurance Company, American Spirit Insurance Company, Atlanta Casualty Company, Brothers Property Corporation, Dempsey & Siders Agency, Inc., GAI-N26LB, Inc., Eagle American Insurance Company, Great American Life Insurance Company, Great American Lloyd's Insurance Company, Great American Management Services, Inc., Hunter Savings Association, Moore Group Inc., Stonewall Insurance Company, and Transport Insurance Company.

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INTRODUCTORY STATEMENT CONCERNING JURISDICTION

Appellant M & M characterizes its application for review before this Court as an appeal, misciting abrogated 28 U.S.C. § 1257(2) as the statutory authority conferring jurisdiction over this matter. Appellant's stated basis for jurisdiction is unclear and ambiguous, and fails to meet the specificity required by the Rules of this Court.

For the purpose of responding to Appellant's filed document filed with the Court, however, Appellant's style of application for review will be responded to accordingly with a motion to dismiss and Great American will identify itself as Appellee. If Appellant's jurisdictional statement is construed as a petition for a writ of certiorari, Appellee asks the Court to consider its responsive pleading a brief in opposition to the petition for writ of certiorari.

Pursuant to the Rules of the Supreme Court of the United States, Appellee Great American moves that the appeal filed in the above-entitled cause be dismissed for the following reasons:

1. The federal question sought to be reviewed was not timely or properly raised, nor expressly considered by the state courts.

2. The appeal fails to articulate a substantial federal question.

STATEMENT

Appellant's lawsuit in a Texas State court was dismissed by summary judgment in accordance with Texas law because Appellant, a disenfranchised corporation,[2] lacked the capacity to sue in state court. Appellant failed to respond timely to Great American's summary judgment motion.

Appellant's appeal to the state appellate court consisted of various points of error relying exclusively on state law. Based on a review of the record, the state appeals court affirmed the trial court's order granting summary judgment. Appellant filed two motions for rehearing with the appeals court. The first was denied, and the second dismissed.

Appellant attempted an appeal to the Texas Supreme Court. Appellant apparently did not meet the deadline for filing the required Application for Writ of Error, as the Texas Supreme Court dismissed Appellant's Application on November 22, 1988 with the notation "writ dismissed for want of jurisdiction." *See* Appellant's Jurisdictional Statement, Appendix at 2.

Appellant did not properly present its due process claim before any of the state courts below.

---

2. M & M was disenfranchised because of its failure to pay state corporate franchise taxes. *See* Texas Tax Code § 171.252.

ARGUMENT

A FEDERAL QUESTION WAS NOT TIMELY OR PROPERLY RAISED, NOR EXPRESSLY CONSIDERED BY THE TEXAS COURTS.

Appellant's denial of due process claim[3] was not properly presented or preserved for appellate review in the state courts, thus barring its consideration by this Court.

1. Appellant failed to properly raise the federal issue in the state courts.

As a matter of establishing jurisdiction before this Court, Appellant must demonstrate that a federal question was timely presented for due consideration in the appropriate state courts.

In this case, Appellant complains that the trial court's discretionary dismissal of Appellant's lawsuit resulted in a denial of due process. Appellant's first opportunity to raise the due process claim was at the trial court level, by a motion for new trial or motion for reconsideration. Appellant filed neither and, instead, sought review from a state appeals court.

---

3. As discussed further below, Appellant fails to articulate a substantial federal question for consideration by this Court. Unclear is the exact nature or substance of Appellant's denial of due process claim. Appellant does not directly challenge the validity of any Texas law or statute, and merely refers to alleged abuses of discretion by the state courts without substantiating its allegations of specific unconstitutional conduct.

Although Appellant had the opportunity to present its due process claim for consideration by the state appeals court, Appellant's state court appeal brief contained not a word about due process.

Appellant did not even mention due process until it filed a motion for rehearing with the state appeals court, on April 7, 1988, that included other points of error based on state law. Appellant's argument consisted of a glib conclusion characterizing the trial court's granting of summary judgment as a denial of due process without any lucid explanation or identification of specific unconstitutional judicial action or state law. The motion for rehearing was denied by the state appeals court on April 28, 1988.

The Texas Supreme Court never expressly considered Appellant's due process claim as it dismissed Appellant's Application for Writ of Error for want of jurisdiction.

Appellant's appeal lacks any prior final adjudication of a federal question, which is necessary for review by this Court. Because Appellant never properly presented *any state court* with its due process claim, no court was given an opportunity to address the merits of this contention. Review by this Court is clearly not warranted. *Cardinale v. Louisiana*, 394 U.S. 437 (1969) ("the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions"); *Street v. New York*, 394 U.S. 576 (1969) ("when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state court").

2. Appellant failed to properly preserve the due process claim for further appellate review.

In order to preserve a state court's decision or action for appeal to the Texas Supreme Court, an Application for Writ of Error must be filed "within thirty days after the overruling of the last *timely* motion for rehearing filed by any party." Tex. R. App. P. 130(b) (emphasis added).

Appellant's first motion for rehearing was denied by the state appeals court on April 28, 1988. Appellant then filed a second motion for rehearing with the state appeals court. A second motion for rehearing is appropriate when a state appellate court modifies or vacates its judgment, or issues an opinion in connection with the overruling of a motion for rehearing. Tex. R. App. P. 100(d). Since this did not happen, Appellant was not entitled to file a second motion for rehearing.

By filing an improper second motion for rehearing, Appellant neglected to file the necessary Application for Writ of Error to the Texas Supreme Court within the prescribed time. The last timely filed motion for rehearing was denied by the state appeals court on April 28, 1988. Therefore, Appellant's application for writ of error to the Texas Supreme Court was due on or before May 27, 1988, thirty days after the denial of the last *timely* filed motion for rehearing. Tex. R. App. P. 130(b) (emphasis added). Appellant did not file its Application until June 17, 1988.

On November 23, 1988, the Texas Supreme Court dismissed Appellant's Application for want of jurisdiction. Appellant, by its own noncompliance with Texas procedural law, failed to properly appeal this matter to

the Texas Supreme Court and keep intact the appellate chain necessary to reach this Court. Irrespective of merit, this appeal is clearly ineligible for consideration by this Court. *Edelman v. California*, 344 U.S. 357 (1953) ("this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law").

3. Failure to properly preserve the right to appeal prevented state court consideration of the due process claim.

Because Appellant failed to preserve its right to appeal, the Texas courts were prevented from expressly passing on Appellant's claim of denial of due process. As a result, the records of the state courts lack any discussion or treatment of Appellant's constitutional claim. This Court is not the place for first time review of a constitutional issue allegedly arising from a state court system. *Webb v. Webb*, 451 U.S. 493 (1981) ("At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law"); *Cardinale v. Louisiana*, 394 U.S. at 438.

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

1. Appellant fails to attack the constitutionality of any specific state statute.

While Appellant frames its entire due process claim in the context of the Texas summary judgment rule, it

fails to draw into question the validity of *any* state statute. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562, n. 4 (1980) (validity of state statute not "sufficiently drawn in question" not proper for appeal). Thus, no appeal should lie.

2. Appellant has been afforded due process in the Texas courts.

Appellant alleges that the Texas courts have denied it due process. Actually, any denial of access to the court system resulted from Appellant's failure to comply with clear state procedural requirements; specifically, filing a timely response to a summary judgment motion, and filing a timely Application for Writ of Error to the Texas Supreme Court.

3. The actions of the Texas courts were proper and in accordance with Texas summary judgment law.

The matter before the trial court was a summary judgment motion. In Texas, a summary judgment motion is a vehicle for determining the legal sufficiency of a lawsuit. Texas rules of procedure require that a response to a motion for summary judgment must be filed no later than seven days before the hearing in order to be considered timely. Tex. R. Civ. Pro. 166a(c). Appellant acknowledges in its Jurisdictional Statement that it did not file a response to the summary judgment motion until one day before the hearing. *See* Appellant's Jurisdictional Statement at 4.

Through all of Appellant's attempts at appeal, the *only* denial of due process argued by Appellant is that the state courts allegedly "ignored" an amended petition filed by Appellant in the trial court. Appellant contends that the amended petition should have been considered by the state trial and appellate courts, even in the absence of a timely response by Appellant to the summary judgment motion evidence.

Texas law is clear that an amended pleading is not a response to a summary judgment motion, nor is it competent summary judgment evidence. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex. 1979). Accordingly, under Texas procedural law, Appellant's amended petition could not be properly considered as a response to Great American's motion for summary judgment. It was entirely proper for the trial court to grant Great American's motion for summary judgment since there was no proper response from Appellant to this motion.

CONCLUSION

Appellant has not followed the procedure necessary for review by this Court. Even if Appellant had followed proper procedure, this appeal fails since it does not present a substantial federal question.

Appellee accordingly respectfully requests that this Court dismiss or deny Appellant's request for appeal.

Respectfully submitted,

By TIMOTHY P. DOWLING
GARY, THOMASSON, HALL & MARKS
Counsel for Appellee,
Great American Insurance Company
P. O. Box 2888
Corpus Christi, Texas 78403
(512) 884-1961